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In the Supreme Court of the United States

October Term, 1969

No. [redacted]231

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, Local 1416, AFL-CIO

Petitioner,

vs.

ARIADNE SHIPPING COMPANY, LIMITED, a Liberian corporation, and EVANGELINE STEAMSHIP COMPANY, S. A., a Panamanian corporation,

Respondents.

BRIEF OF RESPONDENTS

THOMAS H. ANDERSON
Attorney for Respondents

RICHARD M. LESLIE
1000 First National Bank Bldg.
Miami, Florida 33131

SHUTTS & BOWEN
1000 First National Bank Bldg.
Miami, Florida 33131

MULLER & MINTZ
100 Biscayne Boulevard, North
Miami, Florida 33132
Of Counsel for Respondents

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BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. WHETHER THE NATIONAL LABOR RELATIONS ACT PREEMPTS STATE JURISDICTION TO ENJOIN PICKETING BY A LONGSHORE UNION ALLEGEDLY PROTESTING THE PAYMENT OF SUBSTANDARD WAGES TO NON-UNION FOREIGN

SEAMEN WHO LOAD AND UNLOAD PASSENGERS' BAGGAGE AND SHIP'S STORES FROM A FOREIGN FLAG VESSEL IN AN AMERICAN PORT.

2. WHETHER THE ISSUANCE OF AN INJUNCTION AGAINST PICKETING VIOLATES PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

Respondent (hereinafter referred to as ARIADNE or Foreign Flag Vessel) is a foreign corporation that operates one foreign-registered passenger ship, the S.S. Ariadne. This Foreign Flag Vessel makes regularly scheduled passenger cruises between Miami, Florida, and various West Indies and Caribbean ports twice weekly. (A.3a). (There was a second foreign-registered passenger ship, the S.S. BAHAMA STAR, carrying passengers to foreign ports up to 1968, but it is no longer owned or operated by Respondents. Therefore, the question is moot as to that vessel and that Respondent.)

The ARIADNE is engaged in the business of owning and operating one cruise ship for the transportation of passengers. (A.3a) She carries no cargo whatsoever. The crew of the ARIADNE are non-resident aliens who signed and are covered by Ship's Articles of Liberia. (A.3a). The ship's crew, as part of their duties, loaded and unloaded ship's stores and passenger's baggage. (A.44a-45a). ARIADNE employed no American residents to perform any loading or unloading. Trial counsel for the Union

well knows these facts. It was in response to his cross-examination that T. F. Kane so testified[1] in the companion case,[2] involving the same Union, the same type picketing, and the same counsel for the parties.

The above facts show why the record is void of any evidence of actual longshore work done in regard to the Foreign Flag Vessel, just as the record is void of any evidence of actual hiring of employees to do this non-existent work. Likewise the record does not contain any reference to wage scales or wages leading the District Court of Appeals below to agree with the trial court "that no real dispute over wages really existed."

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[1] In the companion case of *Eastern Steamship Lines, Inc. v. International Longshoremen's Assoc., Local 1416*, 66C-5298, involving the same Union, the same type picketing and the same trial counsel for the parties, testimony was taken under oath on May 20, 1966 before the Honorable Gene Williams, Circuit Judge in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, which was the trial court action from which the Union appealed in the cases in footnote 2.

Q. (By Mr. Gopman) What about the cargo which is loaded or unloaded from your ships?
A. We don't have any cargo.
Q. No cargo at all?
A. No.
Q. On either vessel?
A. Either vessel.
Q. Do you load or ship automobiles?
A. No, sir, not any more. I haven't done that for a long time.
Q. You used to do that?
A. Don't take cars either way.

[2] *International Longshoremen's Assoc., Local 1416 v. Eastern Steamship Lines, Inc.*, 193 So2d 73 (Fla. 3d Dist. 1966) and 211 So2d 858 (Fla. 3d Dist. 1968), where the same District Court of Appeal first affirmed the granting of a temporary injunction and then the granting of a permanent injunction.

Petitioner's whole claim is based on the bald assertion that the Foreign Flag Vessel employed Americans to do longshore work in Florida ports. This is categorically false. The true facts have been pointed out to the trial court, the appellate court and the Florida Supreme Court by the briefs and record. That is why the trial court found "that there is no labor dispute" and why this finding was twice affirmed on appeal (after the temporary injunction and again after the permanent injunction) and not disturbed on certiorari to the Florida Supreme Court. It also explains why the Union had no evidence to the contrary to present to the trial court **between** the granting of the temporary injunction[3] (May, 1966), and the granting of the permanent injunction (May, 1967), a period of twelve months.

The Petitioner first picketed on May 13, 1966, claiming, "Eastern Steamship Co. refuse to maintain adequate safety conditions for passengers and employees." On May 17, 1966, "Eastern" filed a complaint against the Union and on May 20, 1966, a temporary injunction was entered against the Union. A few days later, May 23, 1966, the Union picketed again, using the same signs, only pasteing the ship's name over that of "Eastern" (A.4a). On May 24, 1966, ARIADNE filed a verified complaint against Petitioner-Union (A.3a-8a) to enjoin the Union from picketing ARIADNE with signs reading as follows:

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[3]Affirmed on appeal, *International Longshoremen's Assoc., Local 1416 v. Ariadne Shipping Co., Ltd.*, 195 So2d 238 (Fla. 3d Dist. 1967).

ARIADNE

REFUSE

To Maintain Adequate Safety Conditions

for

Passengers and Employees

International Longshoremen's

Association — Local 1416

Miami, Florida

At the hearing on May 20, 1966, the Petitioner-Union, through its attorney, made it abundantly clear that the Union was concerned with the "safety conditions" aboard the ships. (A.29a-33a). It was at this hearing that ARIADNE first became aware that Petitioner said it also was picketing with signs alleging that the Foreign Flag Vessel paid its employees "substandard wages." (A.28a).

The trial court entered an order enjoining Petitioner from, inter alia, picketing, indicating or inferring that a labor dispute existed between the parties (A.16a), and from inducing ARIADNE'S customers and potential customers to cease doing business with it. (A.16a). The injunction order was entered upon the court's finding that its jurisdiction was not pre-empted by the National Labor Relations Board since the National Labor Relations Act as written had no application to foreign registered vessels employing alien seamen, that there was no labor dispute, and that the Union's acts were illegal under state law. (A.16a).

INTRODUCTION TO ARGUMENT

The thrust of the Union's argument under Point I is that the trial court did not have jurisdiction in this cause. By the abandonment of its argument relating to Paragraphs 1 and 2 of the restraining order (A.16a), the Union has admitted that half of the injunction order (as to safety) was correct. Therefore, Petitioner tacitly admits the court had jurisdiction. With this position we agree, for there can be no doubt that "safety conditions" of the ARIADNE are within the purview of the decisions in **Benz v. Compania Naviera Hidalgo, S.A.**, 353 U.S. 138 (1957), **McCulloch v. Marineros de Honduras**, 372 U.S. 10 (1963), and **Incres SS. Co. v. Maritime Workers Union**, 372 U.S. 24 (1963).

ARGUMENT

POINT I

STATE JURISDICTION TO ENJOIN PICKETING BY A LONGSHORE UNION AGAINST A FOREIGN FLAG VESSEL EMPLOYING ALIEN SEAMEN IS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

State court jurisdiction to hear a request for, and to award, an injunction between a foreign flag vessel employing alien seamen and an American longshoremen's union is no longer subject to dispute. The court in **Incres S.S. Co. v. Maritime Workers Union**, supra, pointed out quite succinctly that it was no longer "surely arguable" that such disputes were within the purview of the National Labor Relations Act in light of **McCulloch v. Marineros de Honduras**, supra, and affirmatively stated:

> . . . We held today in Sociedad National that the Act does not apply to foreign registered ships employing alien seaman. **Incres S.S. Co. v. Maritime Workers Union**, supra, at p. 26.

Accordingly, it is no longer subject to dispute whether or not the Board has or will take jurisdiction and the trial court properly disposed of this contention.

A. **The decisions of Benz, McCulloch and Incres.**

In the first of the cases, **Benz v. Compania Naviera Hidalgo, S.A.**, supra, the District Court enjoined the foreign crew and the unions, who acted in their behalf, from picketing the foreign flag ship and subsequently entered an award for damages against the unions. The District Court on the trial for damages found that Respondent had no remedy under the Labor Management Relations Act since that Act:

> 'is concerned solely with the labor relations of **American workers** between **American concerns** and their employees in the United States, and it is not intended to, nor does it cover a dispute between a foreign ship and its foreign crew.' (Emphasis supplied). **Benz v. Compania Naviera Hidalgo, S.A.**, supra, at p. 141.

This Court, in its decision affirming the cause, held that the prior act (Labor Management Relations Act of 1947) also did not apply to controversies involving damages resulting from the picketing by American unions of foreign flag vessels operated entirely by foreign seamen under foreign articles.

In **McCulloch v. Marineros de Honduras,** supra, the National Labor Relations Board had ordered a representative election among the foreign crew members of a foreign flag vessel upon the petition of an American seamen's union. The foreign vessel sought relief by injunction in the United States District Court which relief was denied. The Court of Appeals reversed, holding that the Act did not apply to the maritime operations in question. This Court, in concurring with the decision of the Court of Appeals held that:

> . . . the jurisdictional provisions of the Act do not extend to the maritime operations of foreign-flag ships employing alien seamen. **McCulloch v. Marineros de Honduras,** supra, at p. 13.

Upon the same reasoning, the Court in **Incres S.S. Co. v. Maritime Workers Union,** supra, upheld the jurisdiction of a state court to enjoin picketing by an American seamen's union against a foreign flag vessel. In upholding the state court's jurisdiction to enjoin the union from such persuasive picketing, the Court stated, at p. 26:

> . . . We held today in Sociedad National that the Act does not apply to foreign-registered ships employing alien seamen.

The similarity of **Benz-McCulloch-Incres** and this case is clear. In each, as here, an American union picketed a foreign flag vessel operated by alien seamen. In each, as here, the union lacked a legitimate interest and was enjoined from pursuing its injurious course of conduct.

The facts show the Union's pretext. The Union used safety signs and handbills as to "Eastern" and when that was enjoined, the same signs with the name "Ariadne" substituted were used. Later when the Union saw it was failing with "safety" it shifted gears and claimed "wages" was the issue. Of course, no members of the Union are employed by the Foreign Flag Vessel nor have they sought such employment. No cargo is carried and hence no longshoring work.

The scheme is clear. Hurt the ship's business and coerce ARIADNE into firing foreign seamen or reducing their wages and hiring Union members to do the work traditionally done by the ship's crew (carrying passengers' luggage up the gangway and taking aboard ship's stores).

Benz-McCulloch-Incres pointedly stated that the Act, as written, did not apply to controversies resulting from the picketing by American unions of a foreign flag vessel operated by foreign seamen under foreign articles. The Act did not deprive the state court of jurisdiction over this cause.

B. **Application of Benz-McCulloch-Incres.**

1) The jurisdiction of the Board is not predicated on shorebased "contracts."

The Court in **McCulloch v. Marineros de Honduras**, supra, considered without limitation the question of whether or not the National Labor Relations Act had **any** application to foreign registered vessels employing

alien seamen. The Court answered that it did not and that for such foreign vessels to be subject to the Board's jurisdiction affirmative action by Congress was required. No such action has been taken in the six years since this holding and surely Congress therefore agreed that the National Labor Relations Act does not and should not apply to foreign flag vessels employing foreign seamen.

In **McCulloch v. Marineros de Honduras,** supra, the Union had advocated that since the foreign vessels were regularly within American waters and, since the foreign owners of the vessels were in turn owned by an American corporation, the Board had jurisdiction. The Court pointed out, however, that such factors bore on the validity of the "balancing of contacts" theory and that such theory was **not a proper basis** upon which to predicate the Board's jurisdiction. Therefore, whether or not the ARIADNE utilized its foreign crew to load and unload passengers' baggage and ship's stores is not material to the issue, since such activities bear simply on the question of "contacts" and such theory has been repudiated. As the Court said, such a theory would require that:

> . . . the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. . . . [E]nforcement of Board orders would project the courts into application of sanctions of the Act to foreign flag ships on a purely ad hoc weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. **McCulloch v. Marineros de Honduras,** supra, at p. 19

Petitioner would advocate, because these certain activities were performed by employees of the foreign vessel, that the trial court lost its jurisdiction. This is the precise evil the court envisioned in **McCulloch v. Marineros de Honduras**, supra, and why it followed the aforementioned quotation with:

> The question, therefore appears to us more basic; namely, whether the Act as written was intended to have **any** application to foreign registered vessels employing alien seamen. (Emphasis supplied) **McCulloch v. Marineros de Honduras**, supra, at p. 19

The Court held "NO". A more definite pronouncement by the Court of what action would be necessary for Congress to bring such foreign vessels within the jurisdiction of the Board cannot be imagined. Congress has declined to act showing that it does not want foreign flag vessels and crews subjected to the jurisdiction of the Board, and further, that it is aware of the monstrous diplomatic and international problems such jurisdiction would beget.

2) The "activities" complained of are "maritime operations" and interference therewith would affect the 'internal affairs' of the foreign flag vessel.

The fact that **Benz-McCulloch-Incres** is not limited by such descriptive phrases as "maritime operations" or "internal affairs" was fully discussed in sub-paragraph 1 of this section. It is clear that:

> . . . the Act does not apply to foreign-registered ships employing alien seamen. **Incres S.S. Co. v. Maritime Workers Union,** supra, at p. 26.

Accordingly, the attachment of such illusory phrases as "maritime operations" or "internal affairs" cannot invest the Board with jurisdiction where Congress has failed to act initially.

Even assuming for purposes of argument that the **Benz-McCulloch-Incres** decisions could be limited by such phrases, the instant cause is clearly still within their purview. The term "maritime operations" is a broad term, defined repeatedly with respect to activities just like those complained of here, and is the subject of a vast body of law. It is not a term, as Petitioner tries to advocate, which "means the manning of the ship as it plies the seas from port to port." (Petitioner's Brief p. 16); nor is there truly a sharp dividing line or functional distinction between "maritime operations" and "longshore work." Maritime operations quite simply cover the management of the vessel, the loading thereof, the care of its equipment and cargo, and the performance of any task essential to enable it to accomplish its purpose on navigable waters. Petitioner, of all people, should be familiar with the scope of this term.

Not only are the activities at issue here "maritime operations," but any interference with them would involve the "internal affairs" of the ARIADNE. It is undisputed that the crew of the ARIADNE is foreign and signed under Ship's Articles of the Republic of Liberia. Pursuant to these Articles, and as a part of their employment, such alien seamen are required to load and unload

passengers' baggage and ship's stores. Their wages were contracted in light of the ship's articles they are governed by.

Petitioner's interference with the "internal affairs" of the ARIADNE is obvious. Whether the picketing is construed as a coercive tactic to require ARIADNE to pay its employees "a wage" commensurate with that of the Union members or, whether it is construed as an attempt by the Union to force the ARIADNE to replace its employees with Union members (A.41a-42a), it is an infringement upon the contract of employment of the foreign crew and therefore an interference with the "internal affairs" of the ARIADNE.

In short, not only did Petitioner's activities threaten interference with the "maritime operations" of the ARIADNE, but they also could have directly affected her "internal affairs". These are the specific dangers the Court considered when it rejected the "contacts" theory as a proper basis upon which to predicate the Board's jurisdiction. The Board does not have jurisdiction of this cause.

3) Labor Board jurisdiction over the maritime operations of the foreign flag vessel would have extraterritorial effect.

The maritime operations (ship's stores and passenger's baggage) of which Petitioner complains are intimately connected with the ship, and continue whether the ship is in an American port, a foreign port, or on the high seas. Accordingly, there is the continuing danger that differing local laws will be applied to these activities. As the Court, in **Lauritzen vs. Larsen**, 345 US 571 (1952) at p. 581, so adequately observed:

> The virtue and utility of seaborne commerce lies in its frequent and important contacts with more than one country. **If to serve some immediate interest,** the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that multiplicity of conflicting and overlapping burdens would blight international carriage by sea. (Emphasis supplied).

The fear of multifarious interference with the employment contracts and ship's articles of the world's shipping is basic. Not only would the interference which Petitioner advocates become a burden on "international carriage by sea", but it presents the threat of retaliation by foreign nations. Since the position advanced by Petitioner has a direct effect on the employment contracts of alien seamen it would lead not only to displacement of foreign seamen but to reduction in wages to these foreign crews. Immediate steps by other maritime nations against American seamen would be the logical result. This is the effect the court prevented by its decisions in **Benz-McCulloch-Incres.**

Notwithstanding the foregoing, it still must be remembered that Congress has refused to subject foreign registered vessels employing alien seamen to the jurisdiction of the Board. That Congress has this power, if it chooses to exercise it; when a foreign ship voluntarily enters the territorial limits of the United States is accepted. But, Congress has not so acted. Since it has declined to act, arguments directed to the justification of an act which doesn't exist are of no avail.

POINT II

THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT PROTECT UNLAWFUL PICKETING.

The Petitioner-Union attempts to argue justification for its actions by relying on the Freedom of Speech provision of the Constitution. The fallacy of this argument is that the court enjoined the Union from committing a tort, acts in derogation of the rights of the Foreign Flag Vessel.

A] Absent Prior Notice to the Proprietor Picketing Is Prohibited by State Law.

Pursuant to the laws of the State of Florida, a labor union, or individuals purporting to represent a labor union, may pursue their objectives by picketing. **Fountainebleau Hotel Corp. v. Hotel Employees Union,** 92 So.2d 415 (Fla.1957). Florida has recognized the right to picket as a valuable tool of labor unions and employees to obtain **legitimate** labor objectives:

> It cannot be initiated, however, for spite or for reasons other than to accomplish a lawful purpose and then the law, order and decency require that it be done in an atmosphere conducive to reaching a result that is fair to the employer, the employee and the public. **Fountainebleau Hotel Corp., v. Hotel Employees Union,** supra, at p. 418.

Even assuming for purposes of argument that Petitioner's objective or purpose was not illegal, its failure to comply with the state's policy is ground for injunctive restraint. Pursuant to this policy, the State has required that the employer be notified prior to picketing of the object sought to be accomplished by the picketing and that he be afforded a reasonable opportunity to negotiate whatever differences or impediments there may be to accomplishing the objective of such picketing. **Fountainebleau Hotel Corp. v. Hotel Employees Union,** supra; **Sax Enterprises v. Hotel Employees Union,** 80 So.2d 602 (Fla.1955). There was no notification here. Remember no Union member had sought employment by ARIADNE.

That the right to picket is subject to reasonable restrictions is not subject to dispute. **Hughes v. Superior Court of California,** 339 US 460 (1950). To require a union, which does not represent one single employee, to deal honestly and fairly with the employer and the public, is such a reasonable restriction.

Picketing by a labor union carries with it the threat that other organizations will refuse to deal with the proprietor until the asserted "labor dispute" is settled. Where no real "labor dispute" exists, and more importantly where no opportunity has been afforded the proprietor to negotiate any alleged differences, the union's right to picket does not exist.

Reason, decency and law demand that a proprietor be advised, prior to interfering with his business, of the object which the union seeks to achieve and be given a reasonable opportunity to negotiate any differences. The record is devoid of any proof of notice. Absent proof by the Union of such notice, their picketing is illegal under state law and subject to being enjoined.

The proceeding in this matter from the entry of the temporary injunction to the entry of the permanent injunction covered many months. The Union never sought to introduce any evidence concerning wages, employees, or working conditions which would bear on the validity of its alleged "labor dispute."

B] Acts Which Are Beyond The Legitimate Interest Of A Labor Union Are Enjoinable Interference With Proprietor's Business.

The State of Florida has consistently recognized a lawful business as a property right, unlawful interference with which may be enjoined. **N.A.A.C.P. v. Webb's City, Inc.,** 152 So.2d 179 (Fla.2d Dist. 1963) and **Young Adults for Progressive Action, Inc., v. B & B Cash Grocery Stores, Inc.,** 151 So.2d 877, (Fla. 2d Dist. 1963). Petitioner is a longshoremen's union which picketed ARIADNE with signs alleging refusal to maintain adequate safety standards, and then signs alleging that the foreign vessel paid her employees substandard wages. Handbills were also distributed which charged the ARIADNE with being unsafe; nothing being said as to wages or a purported labor dispute.

The hearing for the injunction came on upon a verified complaint that:

> Neither the defendant nor any of its members is employed to perform any work in connection with the operation of the cruise ships which are owned and operated by the plaintiffs . . . and defendant does not represent any of the employees who operate the ships. Furthermore,

neither the defendant nor its members holds themselves out for any employment in the operation of these ships or either of them. (A.4a).

Upon the verified complaint, argument of counsel, and testimony, the court rendered its decision that there was no labor dispute, and further that Petitioner's actions were in violation of Florida law, were causing ARIADNE irreparable injury, and were therefore enjoinable. The court in finding that no labor dispute really existed chose to believe the verified complaint of ARIADNE that the Union had no legitimate interest in her activities and that this picketing was a mere pretext. Since Petitioner had no legitimate interest in the activities of ARIADNE, its actions were wrongful. The Foreign Flag Vessel's business was suffering irreparable harm thereby and the injunction was properly issued.

Petitioner tries to assert however, that since there was no finding of what, exactly, was its objective or purpose that the injunction cannot be sustained. The court recognized Petitioner's purpose to be the displacement of foreign seamen from certain jobs and the substitution of union members when it said (A.41a):

The Court: What is your purpose here?

Mr. Gopman: To get them to stop the ships—

The Court: To hurt the business of these foreign flag companies until it hurts so bad that they are going to, for the purpose of loading and unloading, use your help? And if they sign a contract with you to use your help, then your problem is over, isn't it? (A.41a).

CONCLUSION

For all the reasons stated, the judgment should be affirmed.

December, 1969.

Respectfully submitted,

SHUTTS & BOWEN
Attorneys for Respondent
1000 First National Bank Building
Miami, Florida 33131

By THOMAS H. ANDERSON
THOMAS H. ANDERSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 24 day of December, 1969, to Waldman & Waldman, Attorneys for Petitioner, at 501 Fifth Avenue, New York, New York 10017.

By Richard M. Leslie
RICHARD M. LESLIE